Henry M. Duque, Commissioner, dissenting:

I respectfully dissent from the decision of the majority.

My reasoning, like that of the majority voting for Decision 98-10-057, leads to the conclusion that this Commission has jurisdiction to resolve issues concerning internet traffic and to interpret interconnection agreements. Nonetheless, failures of reasoning, law, due process, and policy preclude me from supporting Decision 98-10-057.

Decision 98-10-057, after resolving the issue of jurisdiction, reaches a novel definition of "local call." Finding of Fact 11 states that "If the rate centers associated with the telephone number used to access the ISP modem lies [sic] within a single local calling area, then such call is a local call." Unfortunately, this finding neither comports with long-standing policies and practices embedded in tariffs filed to comply with prior Commission decisions nor with the reasoning contained in Decision 98-10-057 itself. Instead, it subtly shifts from a definition of a "local" call determined by locations, to a definition of "local" that derives from numbering conventions. There is no basis for this change, no analysis of its policy consequences, and no argument in the decision itself that supports this change.

For the longest time, the local service area has been defined in tariffs as:

> "An area within which are located the stations which customers may call at exchange rates, in accordance with the provisions of exchange tariffs. The local service area may include the whole or a part of an exchange area, or all of two or more exchange areas." (Pacific Bell Tariff, Schedule Cal. P.U.C No. A2 5th Revised Sheet 17, Filed January 29, 1996).[1]

Thus, the prime determination of whether a call is local is the physical location of the caller and the physical location of the party called – not the rate centers associated with the caller's number and the number of the party called.

Decision 98-10-057 itself follows the reasoning that it is location – not numbering

[1] Note that 1996 is the date of the last modification to this tariff page. The section quoted did not change in 1996. From the current tariff page it is not possible to determine when the quoted section was last modified.

convention – that counts:

> "Consistent with the FCC's characterization of Internet service, we conclude that the relevant determinant as to whether ISP traffic is intrastate is the distance from the end user originating the call to the ISP modem. If this distance is within a single local calling area, then we conclude that such call is a local call, and subject to this Commission's jurisdiction." (Mimeo, p. 12, emphasis added).

This reasoning calls for a very different finding of fact than Finding of Fact 11. It would support a finding of fact which states that a call is "local" when the distance from the rate center that contains the exchange where the caller is located to the rate center that contains the exchange in which the modem is located measures less than twelve miles. It does not support Finding of Fact 11 as contained here.

Finding of Fact 11's new definition in which "local" is determined by the telephone numbers, not locations, has significant policy consequences for all Californians. In particular, Finding of Fact 11 deems "local" any call placed between two numbers associated with a single "rate center," even if the phone or modem answering that call is hundreds of miles away. Consequently, if there is no link between the location of an ISP modem and the number assigned, all calls within a state to a modem could become "local" through the strategic purchase and assignment of telephone numbers by a Competitive Local Carrier (CLC). If, on the other hand, CLCs strictly follow a practice of assigning numbers to ISP modems based on the physical location of the modem answering the call, then Finding of Fact 11, although not justified, produces no change in the rating of calls.

Determining the facts of the situation – whether or not numbers are linked to the location of specific modems – is thus particularly important. Indeed, facts determine whether Finding of Fact 11 constitutes a wholesale revision of telephone pricing policies or is merely an infelicitous effort to restate traditional policy. This proceeding, however, developed no record concerning the numbering policies of CLCs or other carriers. Thus, it established no facts concerning number assignment practices in California.

This threat to current pricing policies is more than an abstract musing about a failure to develop a record. There is a current investigation in the State of Maine, in particular, to determine whether a carrier used multiple NXX codes "allowing customers

to avoid toll charges, rather than for the purpose of providing local exchange service."[2] Maine appears to view this practice, if documented, as one that undermines the traditional rating of calls. In particular, this practice would end all distinctions between local and toll calling.

If **any** California company assigns telephone numbers independent of location, Finding of Fact 11 creates mischief. Without any consideration of past pricing policy, it facilitates the practice of bypassing toll charges through the purchase of phone numbers. Indeed, unless some previous Commission ruling has set numbering policy, a fact not in evidence, Finding of Fact 11 would appear to establish a new rating practice that can readily eliminate all toll charges for many customers. This is reckless and unsound policy. It has no basis in fact or in law. Moreover, the adoption of Finding of Fact 11 without facts or hearing constitutes legal error. At a minimum, this reversal of Commission pricing policy requires a hearing.

Next, Decision 98-10-057, relying on this unsupported change in policy that permits numbers, rather than locations, to determine the rating of a call, orders the immediate payment of reciprocal compensation for calls placed to ISPs (Ordering Paragraph 2). In this sweeping step, the decision resolves actual and potential disputes concerning hundreds of interconnection contracts negotiated under the supervision of the Commission. Clearly, this order, based on an unsupported change in policy taken without a hearing, lacks a legal foundation. Issuing this order thus constitutes legal error.

In addition to its faulty reasoning, D.98-10-057 denies basic rights of due process. The decision orders the payment of compensation by incumbent carriers without examining the wording of a single contract and the contract terms that govern compensation. In adopting D.98-10-057, the Commission rejected a legally defensible alternative that would have the Commission examine the terms in a particular contract before ordering payment. This reasonable approach would determine how a specific contract addresses the pricing of calls to internet service providers or whether a contract either uses or defines the term "local" call. After a review of a disputed contract, the

[2] State of Maine, Public Utilities Commission, Docket No. 98-758, Notice of Investigation, October 6, 1998.

Commission could issue a decision interpreting it, including compensation terms. This approach, rejected in the rush to adopt Decision 98-10-057, should be ordered. Failure to do so would constitute another legal error.

Finally, in addition to committing legal error, Decision 98-10-057 constitutes poor regulation. Decision 98-10-057 neither asks nor answers any questions concerning the effects of its new call-rating policy on California's information infrastructure. Thus, its approach to decision making denies the very premise of good regulation, which is that rational decisions based on facts and reason serve the public interest. Moreover, this rational process is enshrined in the statutory guidance contained in Section 709 of the Public Utilities Code, which recommends that telecommunications regulators consider the consequences for the state's telecommunications and information infrastructure of regulatory decisions. Thus, Decision 98-10-057 fails to comport with Section 709 of the Public Utilities Code.

In summary, failures of reasoning, legal errors, failures to provide due process, and faulty regulatory actions endemic to Decision 98-10-057 compel my dissent.

/s/ HENRY M. DUQUE

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